



Oregon

Kate Brown, Governor

Government Ethics Commission

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August 28, 2019

Sandy Braden, Chief of Staff
Oregon Youth Development Division
Oregon Department of Education
255 Capitol Street NE
Salem, Oregon 97310-0203

Re: Advice Number 19-180I

Dear Ms. Braden:

This letter of advice is provided in response to your request received on August 16, 2019, which presents questions regarding potential ethical issues arising when the Oregon Youth Development Council engages in grant proposal review and award. The analysis and advice that follows is offered under the authority provided in ORS 244.284 as guidance on how the current provisions of Oregon Government Ethics law may apply to the specific circumstances presented.

Synopsis of Facts

The Oregon Youth Development Council (Council) supports Oregon's education system by developing state policy and administering grant funding to community and school-based youth development programs, services, and initiatives for youth ages 6-24. The Council currently has 18 Council members, who are appointed by the Governor.

With its mandate to administer grant funding, the Council periodically issues requests for grant proposals. A grant proposer (Grantee) may be a non-profit organization, faith based organization, public benefit company, mutual benefit corporation, federally recognized tribe, county, city, or other local government entity. [OAR 423-110-0020]. When Grantees submit grant proposals, those grant proposals are reviewed and scored by Council staff, who then present that information for Council review and final award approval.

Questions

In the current round of grant proposals, it appears that one or more Council members may be employed by a Grantee; other Council members may work closely with a Grantee; and still other Council members may serve on the board of a Grantee. In light of these connections between Council members and Grantees, you have asked:



1. How should the Council members handle actual and potential conflicts of interest?
2. Whether Council members with a conflict of interest are required to recuse themselves from any voting process? and
3. If staff presented a “blind” report to the Council, removing any potential Grantee identification, would that allow the Council members with conflicts of interest to participate in the vote, or should they recuse themselves regardless?

Statutes

Under Oregon Government Ethics law, appointed public officials, such as the Council members, are public officials, as defined in ORS 244.040(15), and must comply with the provisions of ORS Chapter 244.

A conflict of interest is defined as any action, decision, or recommendation that a public official makes in his or her official capacity, the effect of which would be or could be to the private financial benefit or detriment of the public official, a relative, or a business with which the public official or his or her relative is associated. An actual conflict of interest occurs when the effect of the official action, decision, or recommendation would have a certain private financial impact. A potential conflict of interest occurs when the effect of the official action, decision, or recommendation could have a private financial impact. [ORS 244.020(1) and (13)].

ORS 244.020(2) defines a business as any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

A “business with which the person is associated” includes:

- Any private business or closely held corporation of which the person or the person’s relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person’s relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth \$1,000 or more at any point in the preceding calendar year. [ORS 244.020(3)(a)].

- Any publicly held corporation in which the person or the person's relative is a director or officer or in which the person or the person's relative owns or has owned \$100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year. [ORS 244.020(3)(b) and 244.020(3)(c)].
- For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060(3). [ORS 244.020(3)(d)].

ORS 244.020(16) defines a relative as: (a) the public official's spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law; (b) the parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the spouse of the public official; (c) any individual for whom the public official has a legal support obligation; or (d) any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment.

When an appointed public official is met with an actual or a potential conflict of interest, the public official must publicly announce the nature of the conflict of interest once on each occasion that the issue giving rise to the conflict occurs. If met with a potential conflict of interest, following the public announcement, the public official may continue to participate in his or her official capacity in any discussion, debate, or vote on the issue. [ORS 244.120(2)(a)]. If met with an actual conflict of interest, following the public announcement, the public official must refrain from discussion, debate, or vote on the issue. [ORS 244.120(2)(b)].

Analysis

Public officials are individually responsible for exercising their own good judgment in determining whether or not they have a conflict of interest. Because the Council is awarding funding to the Grantees, the conflicts of interest, if any exist, would be actual conflicts of interest, because the effect of the Council's action would have a certain financial impact on the Grantees.

In order to determine whether a conflict of interest will arise, each Council member must determine whether the Grantee in question is a business with which the Council member, or the Council member's relative, is associated, as defined in ORS 244.020(2) and 244.020(3). If the Grantee is not a business with which the Council member or a relative is associated, then there would be no conflict of interest and no need for recusal. If the

Grantee is a business with which the Council member or a relative is associated, then the Council member would have an actual conflict of interest and would be required, under ORS 244.120(2)(b) to make a public announcement of the nature of the conflict of interest and to refrain from discussion, debate, or vote on the Grantee's grant proposal or approval of the grant award.

To determine whether a Grantee is a business with which the Council member or a relative is associated, one must first determine whether the Grantee is a business. ORS 244.020(2) defines a business as a legal entity, in various forms, that is operated for economic gain. It excludes from the definition of business an income-producing 501(c) non-profit corporation with which a public official is associated only as a member, board director, or in a nonremunerative capacity.

Possible Grantees include tribes, counties, cities, and other local governments (collectively, governmental units). Because governmental units are not legal entities operated for economic gain, they do not fall within the definition of a business; therefore, they cannot be businesses with which the Council members are associated. Thus, even if the Council member or a relative is an employee of such a Grantee, the Council member would not have a conflict of interest and could participate in the discussion, debate and vote on the Grantee's grant proposal.

Other possible Grantees are non-profit, faith-based, public benefit and mutual benefit organizations. Some or all of these organizations may be tax exempt under section 501(c) of the Internal Revenue Code. If the Grantees are not tax exempt 501(c) organizations, then they would be legal entities operated for economic gain, and would be businesses, as defined in ORS 244.020(2). If the Grantees are tax exempt 501(c) organizations, then they would not be considered businesses if the Council member or a relative is associated with them only as a member, board director, or in a nonremunerative capacity. If, however, the Council member or a relative is an employee or receives any remuneration from the Grantee, then the organization would be considered a business, even if it is tax exempt under section 501(c).

If the Council member determines that the Grantee in question is a business, as defined in ORS 244.020(2), then the Council member would need to determine whether it is a business with which the Council member or a relative is associated, as defined in ORS 244.020(3). There are three ways in which a Grantee could be a business with which the Council member or a relative is associated:

- If the Grantee is a private business or closely held corporation and the Council member or a relative is a director, officer, owner, employee or agent, or owns currently or has owned stock or other equity interest worth \$1,000 or more during the preceding calendar year, then the Grantee is a business with which the Council member or a relative is associated. [ORS 244.020(3)(a)].
- If the Grantee is a publicly held corporation and the Council member or a relative is a director or officer, or owns currently or has owned \$100,000 or more in stock or other equity interest at any point in the preceding calendar year, then the Grantee is a business with which the Council member or a relative is associated. [ORS 244.020(3)(b) and (c)].
- If the Council member or a relative is required by ORS 244.050 to file a statement of economic interest, then any business required to be listed as a source of income on that statement of economic interest is a business with which they are associated. [ORS 244.020(3)(d)]. Thus, if the Council member or a relative lists the Grantee as a source of income on a statement of economic interest, then the Grantee is a business with which the Council member or a relative is associated.

For the three scenarios described in your request – where the Council members are associated with the Grantees as (a) employees, (b) work associates (i.e., “work closely with”), and (c) board members -- an actual conflict of interest would arise in each case where the Grantee is a business with which the Council member or a relative is associated. No conflict of interest would arise for Council members solely because they “work closely” with a Grantee. But for those cases where the Council member is an employee or board member of the Grantee, then an actual conflict of interest may arise if the Grantee is a business with which the Council member or a relative is associated. In such a case, the Council member is required by ORS 244.120(2)(b) to disclose the conflict of interest by making a public announcement of the nature of the conflict of interest and to refrain from any participation in the matter giving rise to that conflict.

The proposal to have staff present a “blind” report to the Council would not satisfy the statutory requirements. If one of the Grantees is a business with which the Council member or a relative is associated, then an actual conflict of interest would arise, regardless of whether the report is blind or not. In such a case, the Council member would still need to disclose the conflict of interest and refrain from participation.

We have provided the following hypothetical examples to help illustrate this analysis:

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- Grantee is the YMCA, a mutual benefit corporation that is 501(c) tax exempt. Council member Myers serves on the YMCA board of directors and receives no remuneration. Council member Myers would not have a conflict of interest because the YMCA is not a business under ORS 244.020(2) and thus is not a business with which Council member Myers is associated.
- Council member Gould's son is employed as a summer lifeguard at the YMCA. Council member Gould would have a conflict of interest because the YMCA is a business, under ORS 244.020(2), and is a business with which Council member Gould's relative is associated, under ORS 244.020(3). Council member Gould would need to publicly disclose the conflict of interest and refrain from participation in the discussion and vote on the YMCA's grant proposal.
- Grantee is Edu-Vision, a non-profit 501(c)(3) corporation. Council member Christon is its owner and is a salaried employee. Council member Christon would have a conflict of interest because Edu-Vision is a business, under ORS 244.020(2), and is therefore a business with which Council member Christon is associated, under ORS 244.020(3). Council member Christon would need to publicly disclose the conflict of interest and refrain from participation in the discussion and vote on Edu-Vision's grant proposal.

As you can see, the determination of whether a Grantee is a business with which a Council member or a relative is associated can be very fact-specific. We encourage you or the Council members to contact our office directly at 503-378-5105 or ogec.mail@oregon.gov. Staff is available to answer questions by phone or e-mail every day.

Sincerely,



Ronald A. Bersin
Executive Director

RAB/svm

****Disclaimer****

This staff advice is provided under the authority given in ORS 244.284(1). This opinion offers guidance on how Oregon Government Ethics law may apply to the specific facts described in your request. This opinion is based on my understanding and analysis of the specific circumstances you described and should not be applied to circumstances that differ from those discussed in this request.